

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Implementation of Section 309(j)
of the Communications Act
Competitive Bidding

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PP Docket No. 93-253

To: The Commission

RESPONSE TO PETITIONS FOR RECONSIDERATION

QUENTIN L. BREEN, by his attorneys and pursuant to Section 1.429 of the Commission's rules, hereby comments on one aspect of the several petitions for reconsideration that have been filed in this proceeding. In particular, Mr. Breen urges positive action on the Petition for Reconsideration of the Commission's *Second Report and Order* in this proceeding filed by the Association of Independent Designated Entities ("AIDE"), on June 3, 1994, and the Petition for Reconsideration of the Commission's *Fourth Report and Order* filed by ITV, Inc. ("ITV") on June 13, 1994, in each case to urge a more liberal attitude toward the development of full market settlements. Mr. Breen strongly supports reconsideration and revision of Section 1.2105 of the general auction rules to the extent that such regulation prohibits or otherwise restricts the ability of mutually exclusive applicants to discuss and possibly negotiate full market settlements.

In granting the Commission the authority to use competitive bidding to award licenses, Congress certainly did not intend to diminish the opportunity for applicants to settle their differences before an auction. To the contrary, the Omnibus

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Budget Reconciliation Act of 1993 (the "Budget Act") expressly provides that

Nothing in this subsection, or in the use of competitive bidding shall . . .

(E) Be construed to relieve the Commission of the obligation in the public interest to continue to use . . . negotiation and other means in order to avoid mutual exclusivity in application and licensing proceedings.

Ironically, the Budget Act makes no mention of the possibility of bid rigging, and imposes no obligation on the Commission to adopt anti-collusion regulations. Yet that was a central issue considered by the Commission in adopting the auction rules in the *Second Report*.

In the *Second Report*, the Commission acknowledged (at para. 221) that it had requested comments on the need for rules prohibiting collusive conduct. Although it mentions several commenters who supported such an approach, it fails to mention that many commenters opposed such regulations as they would necessarily limit the opportunity for full market settlements.^{1/} Instead, apparently fearing that general anti-trust laws are insufficient to protect against true bid-rigging, the Commission has imposed stiff anti-collusion rules of its own. It has required that applicants disclose at the time of filing Form 175 any parties with whom they have entered into any consortium, joint venture, partnership or other agreement or understandings that relate in any way to the competitive bidding process; of no less significance, the rules expressly prohibit any bidder from cooperating, collaborating, discussing or disclosing *in any manner* the substance of its bids or bidding strategies with other bidders (unless they are part of the bidding

^{1/} See e.g., comments of Thumb Cellular Limited Partnership;; Bell Atlantic Personal Communications, Inc.; BellSouth Corporation.

consortium identified in the application), *from the time of filing of Form 175 until the high bidder has made its required downpayment.*

Given this broad prohibition, it is effectively impossible for applicants to meet to consider a full market settlement. Indeed, Section 1.2105 of the Rules is so restrictive that it guarantees that, once mutual exclusivity exists, it will continue to exist up to and through the auction. Once applications are filed and mutual exclusivity is created, Section 1.2105 expressly prohibits the use of negotiations and other means to "avoid mutual exclusivity in application and licensing proceedings"; this rule directly contravenes the Commission's "obligation in the public interest" to continue to use such methods.

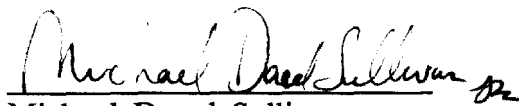
The Commission has long encouraged full market settlements among mutually exclusive applicants as an efficient means of expediting the provision of service to the public without unduly burdening the agency's resources. Full market settlements were the hallmark of the early development of the cellular industry, successfully bringing all potential claimants under a single settlement umbrella to avoid not only the uncertainties of the licensing (hearing or lottery) process, but also the post-designation litigation that characterized so many markets in which settlements could not be reached. There is simply no public interest reason for prohibiting parties from attempting to achieve a similarly beneficial result when the licensing mechanism is an auction.^{2/}

^{2/} The only possible adverse result of a full market settlement is the reduction in the amount of money raised in the auction. But the Commission has consistently stated that the competitive bidding process was not designed simply to achieve the highest return for the government, but rather to achieve the most efficient and effective licensing of the spectrum. See e.g., *Second Report*, at para. 73

The Commission's auction regulations stand the public interest on its head. Instead of encouraging applicants to settle their differences to remove mutual exclusivity, and thus the uncertainties and inefficiencies of the auction licensing processes, the rules effectively mandate that parties will go to the end of the auction without ever being able to consider the alternative of a settlement. This approach is directly contrary to the legislative mandate contained in the Budget Act. Mr. Breen agrees with AIDE and ITV that Section 1.2105 and the Commission's anti-collusion rules and policies should be reconsidered, and regulations that allow parties to pursue full market settlements substituted instead.^{3/}

Respectfully submitted,

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^{3/} Of course, if illegal collusion among applicants is identified, designed solely to fix bid prices or otherwise apportion markets, the Commission has adequate remedy under the criminal statutes to redress such conduct, without restricting applicants' *bona fide* efforts to achieve a full market settlement prior to the auction.

Certificate of Service

I, Abby Gurewitz, hereby certify that on this 29th day of June, 1994, copies of the foregoing "Response to Petitions for Reconsideration" were mailed via first class United States mail, postage prepaid, to the parties named below.

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